

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

and proof of service

77-1423

To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

In the Matter of the Grand Jury
Subpoenas Served on

ANDRES ROSADO,
JULIO ROSADO, and
LUIS ROSADO,

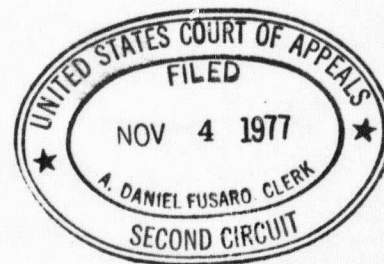
Docket No. 77-1423

Appellants.

-----X

BRIEF FOR APPELLANTS

APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.



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PS

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JULIO ROSADO, and :
LUIS ROSADO, :
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Appellants. :
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ISSUES PRESENTED

1. Whether the failure of the district judge to give advice to or make inquiry of appellants Julio and Luis Rosado on the subject of their decision to proceed pro se leaves the record herein insufficient to establish a knowing and intelligent waiver of their right to counsel.
2. Whether the record establishes that Mr. Kunstler was not yet adequately familiar with the case to represent Andres Rosado on August 22, 1977.
3. Whether appellants presented a sufficient showing of possible illegal wiretapping to trigger the requirement that the government respond under 18 U.S.C. §3504.

STATEMENT PURSUANT TO RULE 28 (a) (3)

A. Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (Ow n, J.), dated September 27, 1977, denying appellants' motion:

a) to vacate that Court's order of August 22, 1977, holding appellants in civil contempt pursuant to 28 U.S.C. § 1826*, and

b) to direct the government to respond to appellants' claims of illegal electronic surveillance and for a hearing on said claims of illegal electronic surveillance.

Timely notice of appeal was filed, and the District Court granted appellants leave to appeal in forma pauperis. On October 20, 1977, this Court appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellants have been continuously incarcerated since August 22, 1977, pursuant to the contempt order herein.

B. Statement of Facts

1) The Subpoenas

Appellants were subpoenaed on August 12, 1977, by a grand jury which is purportedly investigating a series of terrorist bombings attributed to the "FALN" (hereinafter, "the bombing in-

*Appellants moved, by way of order to show cause, dated September 14, 1977, to vacate the August 22, 1977, order holding them in civil contempt. Because that motion was made before the time in which to file a notice of appeal from the August 22 order had lapsed, and because the Court reserved decision on the September 14 motion, and because it was deemed reasonable to avoid successive appeals in this case, appellants agreed to take their appeal from the Court's ultimate decision on their motions, and the Court noted that its Memorandum and Order of September 27 is the final order herein (see A-59, note 8).

vestigation"). Said grand jury is the successor to a previous grand jury (the April, 1975, Additional) which was also purportedly participating the same bombing investigation.

2) Background

Appellant Andres Rosado had been continuously represented by Jesse Berman, Esq., in connection with the bombing investigation since approximately March 5, 1976. On that date, Mr. Berman telephoned Assistant U.S. Attorney Nesland (who was then conducting the bombing investigation) and informed him that Mr. Berman was representing Andres Rosado, who was first subpoenaed in connection with the bombing investigation in February, 1976. Mr. Berman met with Andres Rosado several times in his office. He had also met with Andres Rosado and Mr. Nesland and three F.B.I. agents in Mr. Nesland's office on March 10, 1976. He had also accompanied Andres Rosado at Andres Rosado's April 7, 1976, appearance before said April, 1975 Additional Grand Jury. After that appearance, Andres Rosado's subpoena was adjourned indefinitely. Mr. Berman was thus uniquely familiar with Andres Rosado's legal and factual history in connection with the bombing investigation.

Mr. Berman had also been representing appellant Julio Rosado (and his wife, Lois Rosado) in connection with the bombing investigation since approximately May 13, 1976. Julio and Lois Rosado were subpoenaed to appear on May 19, 1976, before the said April, 1975 Additional Grand Jury. Their subpoenas had ultimately been adjourned indefinitely, and they were never actually called to testify at that time. Mr. Berman had had several conversations and correspondences with Mr. Nesland in connection with Julio (and Lois)

Rosado's legal and factual history in connection with the bombing investigation.

In January, 1977, when the current grand jury began subpoenaing members of the National Commission on Hispanic Affairs of the Protestant Episcopal Church (hereinafter, "the Commission"), Mr. Berman was contacted by appellant Luis Rosado, who was then a consultant to the Commission, as well as the director of the Grand Jury Education Project of the National Council of Churches. Luis Rosado was of the opinion that the grand jury had begun to arbitrarily subpoena anyone connected with the Commission, and he asked Mr. Berman to represent him. Mr. Berman agreed, and the two met on several occasions in Mr. Berman's office in anticipation of Luis Rosado's being subpoenaed.

In August, 1977, Mr. Berman was away in Guatemala and Mexico on his annual summer vacation. On August 11, 1977, while in Guatemala City, he called New York City and ascertained that there were no pressing legal matters concerning the Rosado's.* On the very next day, August 12, 1977, the government subpoenaed Andres, Julio and Luis Rosado to appear before the bombing investigation grand jury. The subpoenas were returnable on August 17, 1977.

3) The Application for an Adjournment

On August 16, 1977, William Kunstler, Esq., appeared before Judge Owen (who was then the Part One judge), and made an application for an adjournment. The minutes of that application list

*See Affidavit of Jesse Berman, Esq., dated September 14, 1977, reproduced in Appellants' Appendix, at A-25 through A-36.

Mr. Kunstler as "Attorney for Applicants," and indicate that the application was made "in the robing room adjacent to Courtroom 506" (R. 1-2)*. The government had requested that the application be heard in the robing room rather than in open court, and appellants were not present during that application (R.2).

Mr. Kunstler told the Court:

I came into the picture at ten-thirty last night...[A]t ten-thirty last night [appellants] came to see me. Their lawyer is a man named Jesse Berman. He is in Guatemala on one of these camping trips and can't reached. ... They asked me to represent them until Jesse Berman came back, which would be about the 26th or the 28th of August.** ... I didn't even have their names correct today when I came in here.... I want time to be able to argue this intelligently.... I am just asking your Honor to give us a little time so they don't go in without attorneys. ... Normally, they would have the right to move to quash, and they will never be able to do that unless we have a little time.

(R.3-4, 9-10, 12-13;
emphasis added)

Mr. Kunstler explained that he himself had to go to Cleveland the following day (August 17) to argue the Kent State site case (R.4). The Court adjourned appellants' subpoenas to August 22, 1977 (R.15).

*"R" refers to minutes of the robing room application, August 16, 1977.

** Indeed, Mr. Berman reached Laredo, Texas, on August 25, called his office, learned of appellants' situation, then drove day and night, and reached New York City on August 28 (A-29).

4) The Motions Concerning the Subpoena

Mr. Kunstler made motions only on behalf of Andres Rosado:

By written motion dated August 21, 1977, Mr. Kunstler, on behalf of Andres Rosado, sought discovery of all interviews of Andres Rosado conducted by agents of the government, as well as production of the transcript of Andres Rosado's prior grand jury testimony (A-7). No discovery motion was filed by or on behalf of appellants Julio and Luis Rosado.

By written motion dated August 21, 1977, Mr. Kunstler, on behalf of Andres Rosado, sought to quash Andres Rosado's subpoena (A-9). Appellants Julio and Luis Rosado jointed in the motion to quash, each appearing on the motion papers as "Witness pro se" (A-10)

By written motion dated August 21, 1977, Mr. Kunstler moved, on behalf of Andres Rosado, for disclosure of electronic surveillance (A-18). This motion made detailed disclosure demands and was accompanied by a list of telephone numbers and addresses where appellants and their attorneys claimed an expectation of privacy. Appellants Julio and Luis Rosado also joined in this motion, each appearing on the motion papers as "Movant Pro Se" (A-23). The electronic surveillance motion lacked any supporting affidavit.

5) The Hearing on Appellants' Motions

During the morning session of August 22, 1977, the Court heard and denied appellants' motions (H.29-30)*, and directed appellants to proceed to the grand jury room forthwith to respond to

* "H" refers to minutes of the hearing on appellants' motions, the morning session of August 22, 1977.

the subpoenas (H.30-31).

The minutes of that hearing begin by noting that Mr. Kunstler appeared solely for appellant Andres Rosado, while appellants Julio and Luis Rosado each appeared "Pro Se" (H.1). After Mr. Kunstler announced his appearance on behalf of Andres Rosado, the court clerk addressed the remaining two appellants:

THE CLERK: Julio Rosado .

MR. J. ROSADO: I'm here for myself.

THE CLERK: And Luis Rosado?

MR. L. ROSADO: Same thing .

THE COURT: All right.

(H.2)

The Court never questioned the fact that Julio and Luis Rosado were appearing pro se. It never questioned either Mr. Kunstler or Julio or Luis Rosado as to why the two were proceeding pro se. Nor did the Court at that time express any skepticism about that procedure. Most significantly, the Court never advised either Julio or Luis Rosado of the rights they were waiving in proceeding pro se, or of their rights if indigent, or of the dangers inherent in proceeding pro se.

The Court conducted the hearing with the clear understanding that Mr. Kunstler had only one client,* and that Julio and Luis Rosado were acting as their own attorneys:

* "THE COURT: Mr. Kunstler, you say your client...."
(H.21; emphasis added)

THE COURT: Mr. Kunstler and Messrs.
Julio and Luis Rosado,
why should the Government
not obtain what it is asking for?

(H.3, emphasis added)

THE COURT: ... Mr. Julio Rosado and Mr. Luis
Rosado and Mr. Kunstler as counsel
for Andres Rosado

(F.30-31)

And both Julio and Luis Rosado spoke for themselves, rather
than rely on Mr. Kunstler (See, e.g., H.3,4-5,5-6,7-8,8-9,9-10,
10-11,11-12).

In connection with the electronic surveillance motion, the
Court repeatedly asked Julio Rosado (H. 5,7,8) why he had offered no
evidence, in the form of an affidavit, to support the motion. No
such affidavit had been filed at that time, either by Mr. Kunstler
or by the two pro se Rosados:

THE COURT: Where is that in these
papers? Did somebody
put that in an affidavit,
something to that effect?
Do you say that is here?

MR. J. ROSADO: No. I believe an affidavit
was not filed in this particular
case.

THE COURT: Then I don't have any
evidence before me.

(H.7)

Appellant Luis Rosado offered to obtain affidavits and
evidence, relating to electronic surveillance, which had been
submitted to a federal grand jury in Chicago in connection with
the same general bombing investigation (H.10), and the Court ex-

pressed interest in the allegations of a wiretap in the Chicago case (H.28). The prosecutor, however, told the Court that the judge in Chicago had "believed that the evidence [of a wiretap] was fabricated ... but I have to look further" (H.28). The Court then denied all the motions, and directed appellants to respond forthwith to the subpoenas (H.29-31).

6) The Contempt Proceeding

The minutes of the contempt proceeding also begin by noting that Mr. Kunstler appeared solely for appellant Andres Rosado, and that appellants Julio and Luis Rosado each appeared "Pro Se" (C.1)*.

During the interval since the hearing earlier that day, the three appellants had appeared before the grand jury, were asked to submit fingerprints, palmprints, photographs, handwriting exemplars and voiceprint exemplars, and all three had refused (C.2). The government sought to have them found in civil contempt.

Mr. Kunstler was under the mistaken impression that the afternoon proceedings of August 22, 1977, were "going to be an immunity grant" (C.18).

Later, when advised that what was happening was a contempt proceeding, Mr. Kunstler was under the mistaken impression that it was a Rule 42(b) proceeding, rather than one under 18 U.S.C. § 1826 (C.25).

* "C" refers to minutes of the contempt proceeding, the afternoon session of August 22, 1977.

The Court again directed appellants to comply (C.23) and they again refused (id.). The government then asked that they be held in civil contempt (id.), and the time came for legal arguments why they should not be found in contempt.

Mr. Kunstler then noted that the two pro se appellants "are not learned in the law" (C.23), and while stressing that he represented only Andres Rosado, Mr. Kunstler noted that there was a Sixth Amendment right-to-counsel point which should be raised on behalf of Julio and Luis Rosado:

[T]here are rights that ought to be protected for Julio and Luis as well. And in the absence of counsel, I just wanted to make the record just reflect that fact.

(C.24-25)

As far as the robing room [conference of August 16], Judge, I was appearing for all three for the purpose of that adjournment. So that I could be present. Then the defendants [sic] reached their conclusion that they would rather wait for Mr. Berman.

(C.26)

Appellant Julio Rosado's explanation of the counsel problem was rejected by the Court;

MR. J. ROSADO: Your Honor, also in relation to the question of counsel, we would have counsel except that Mr. Marmaro, [the prosecutor,] possibly you are familiar with that, refused to allow us the time until our lawyer, who is Jesse Berman, lawyer in both Luis' and my case, to postpone the appearance until he came back. He is on vacation. We were denied his being

in court. And we were told that we would have to either get another lawyer or we would have to proceed pro se, in which case we proceeded pro se.

THE COURT: That matter was not even hinted at before me at any time today, so I am not going to give any weight to that statement.

(C.25)

The Court found all three appellants in contempt and ordered them confined for the life of the grand jury or until they comply with the subpoenas (C.26-27).

7) The Motion to Vacate the Contempts

Mr. Berman returned to New York on August 28, 1977. He obtained copies of the motion papers and of the minutes of August 22, 1977, visited the three appellants in jail at MCC, ascertained that he was still their attorney, attempted to reach the prosecutor (who had gone on his own vacation), filed affidavits of indigency on behalf of the three appellants, obtained and filed copies of affidavits and exhibits on file in the "Chicago case" electronic surveillance motion, prepared and filed original affidavits and telephone bill exhibits in support of appellants' electronic surveillance motion (A-37 through A-45), and moved, by order to show cause, to vacate the contempts and to require the government to respond to appellants' electronic surveillance motion (A-25 through A-36).

Mr. Berman sought to vacate the contempts on the grounds that:

- a) Julio and Luis Rosado, deprived of counsel of their choice, appeared pro se and were jailed without any inquiry whatsoever by the Court as to whether Julio and Luis Rosado

knew what rights they were waiving.... This failure on the part of the Court, even though it was presumably inadvertant, clearly requires a vacatur of the contempt findings against Julio and Luis Rosado.

- b) Andres Rosado, deprived of counsel of his choice (who had a unique familiarity with the case), was represented by Bill Kunstler, who is a very competent attorney, but who obviously was unfamiliar with the bombing investigation or with why Andres Rosado had been subpoenaed. He was unfamiliar with Andres Rosado's testimony before the April, 1975 Additional Grand Jury. Even more significantly, the minutes reveal that even during the afternoon session of August 22, 1977, Mr. Kunstler was laboring under the mistaken belief that he was representing Andres Rosado at an immunity grant proceeding.... If the 6th Amendment Right to adequately prepared counsel is to be taken seriously, the contempt finding against Andres Rosado must be vacated.

(A-32 through A-34)

The Court, on September 16, 1977, heard argument on that motion by order to show cause. The Court, however, refused to have appellants produced for that argument, citing unspecified "security problems" and "dislocation to the Marshal's office" (M.10)*.

During that argument, it became apparent that the Court believed that, because a §1826 contempt is a "civil" matter, appellants did not have rights to counsel similar to the right to counsel in a criminal case: The Court believed that the Criminal Justice Act did not apply to a §1826 contempt (M.7), and it specifically stated:

* "M" refers to minutes of the argument on the motion to vacate the contempts, September 16, 1977.

...this is not a criminal arraignment
or a trial. This is a witness before
a grand jury

(M.16-17)

Mr. Berman (at M.23) cited Faretta v. California,
422 U.S. 806, 835 (1975), in which the Supreme Court cau-
tioned that when one seeks to choose self-representation,

he should be made aware of the dangers
of self-representation, so that the re-
cord will establish that 'he knows what he
is doing and his choice is made with eyes
open.'

Faretta, Supra, 422 U.S. at 835.

The Court cut Mr. Berman off with, "That's a crimi-
nal trial, right" (M.24).

The Court specifically found that Julio and Luis
Rosado were not represented by Mr. Kunstler at the August 22
proceedings:

THE COURT:

[I]t is my finding that one
brother was [represented by
Mr. Kunstler]. The other two,
for reasons best known to them,
decided they would go pro se that
morning although he had agreed
to represent all three of them on
the 16th.

(M.18)

MR. BERMAN:

... I am talking about the con-
tempt proceeding before your Honor
on August 22nd. Do we agree that
Mr. Kunstler did not represent all
three but that he only represented
Andres Rosado?

THE COURT:

He was only appearing as a matter
of record for one. That's correct.

(M.19)

When Mr. Berman asked the Court why it had not questioned Julio and Luis Rosado as to whether they knew what rights they were waiving in proceeding pro se, the Court responded:

[I]t seems to me that as mature citizens those two Rosado brothers were certainly in the position to know what they were doing and I do not feel the duty upon me in that situation that you say the Supreme Court case requires before a trial commences.

(M.26)

The Court reserved decision on the motion to vacate the contempt, as well as on the electronic surveillance motion, which had been amplified by several affidavits and exhibits.*

On September 27, 1977, the Court, in a 13-page Memorandum and Order,** denied all of appellants' motions, except that it authorized transcripts under the Criminal Justice Act.

* The facts which demonstrated adequacy of appellants' renewed electronic surveillance claims will be set forth and discussed in POINT III, infra.

** The Court's entire Memorandum and Order is reproduced in Appellants' Appendix, at A-47 through A-59.

ARGUMENT

POINT I

THE FAILURE OF THE DISTRICT JUDGE TO GIVE ADVICE TO OR MAKE INQUIRY OF APPELLANTS JULIO AND LUIS ROSADO ON THE SUBJECT OF THEIR DECISION TO PROCEED PRO SE LEAVES THE RECORD HEREIN INSUFFICIENT TO ESTABLISH A KNOWING AND INTELLIGENT WAIVER OF THEIR RIGHT TO COUNSEL.

The law in this Circuit is now well settled that a witness who faces possible imprisonment in a \$1826 civil contempt proceeding has a right to the effective assistance of counsel. In re Di Bella, 518 F.2d 955, 959 (2d Cir. 1975). And any purported waiver of that right to counsel must be a knowing and intelligent one, demonstrated affirmatively on the record.

Although there is a right to pro se representation, anyone who proposes to proceed pro se

...should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'

Faretta v. California,
422 U.S. 806, 835 (1975)

In this Circuit, there has long been a clear requirement that the district judge give certain advice to and make specific inquiry of any person who proposes to proceed pro se:

[I]n all cases of this type, no matter how the indigent or other defendant may phrase his prayer for action by the Court, it is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the

choice between defense by a lawyer and defense pro se; that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend pro se, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. In other words, there must be a record sufficient to establish to our satisfaction that the defendant 'knows what he is doing and his choice is made with eyes open.'

United States v. Plattner,
330 F.2d 271, 276 (2d Cir. 1964)

Even the fact that one is an attorney, a member of the bar for 28 years, and "reasonably familiar with criminal law" is not necessarily sufficient to constitute a waiver of the Sixth Amendment right to counsel and to permit one to proceed pro se.
United States v. Harrison, 451 F.2d 1013, 1015 (2d Cir. 1971).

The only way this essential right to counsel can be waived is by giving specific instruction to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights.

United States v. Harrison, supra,
451 F.2d at 1014

See also, United States ex rel. Martinez v. Thomas, 526 F.2d 750, 754-755 (2d Cir. 1975).

Appellants Julio and Luis Rosado were not present in the

robing room on August 16, 1977. The first time they ever appeared before Judge Owen was on the morning of August 22, 1977, when they announced that they were pro se. Judge Owen never asked them why they wanted to proceed pro se. He never told them that if they were indigent, the court would appoint attorneys for them.* He never told them that it is advisable and in their best interest to have lawyers. He never conducted any inquiry bearing upon their capacity to make an intelligent choice. Plattner, supra, 330 F.2d at 276.

It is clear from the minutes of September 16, 1977, that Judge Owen believed that on August 22 he did not have to make a Plattner-type pro se inquiry because a \$1826 contempt proceeding was merely "civil": Judge Owen did not then believe that the Criminal Justice Act applied (M.7),**and he refused to follow Faretta, supra, because "that's a criminal trial" (M.24),

THE COURT: ...this is not a criminal arraignment or a trial. This is a witness before a grand jury....

(M.16-17)

The basic truth is that Judge Owen never questioned appellants Julio and Luis Rosado in any way about their proceeding pro se. One month later, with the benefit of hindsight and in response to counsel's motion to vacate the contempt, Judge Owen suggested that:

* Indeed, after Mr. Berman returned, all three appellants submitted CJA affidavits of indigency. Mr. Berman represented them without fee, pro bono publico, in the district court. And Judge Owen granted them leave to appeal in forma pauperis.

** Judge Owen did correct himself in his Memorandum and Order, on the question of the applicability of the CJA (A-8).

...it occurred to me that this [pro se] might be a tactical device that was being utilized for some purpose, I knew not what.

MR. BERMAN: You should have asked.

THE COURT: Well, the people wanted to do that.

(M.25)

The mere fact that appellants Julio and Luis Rosado "wanted to" proceed pro se is certainly not dispositive and certainly did not relieve the Court of its duty to make a Plattner-type pro se inquiry.*

The error in this case occurred at the beginning of the morning proceedings of August 22, 1977, when the Court failed to make any inquiry on the pro se questions. By the end of that same day, appellants Julio and Luis Rosado were complaining that they now faced incarceration and that they wanted their lawyer, Mr. Berman. The Court's position was that appellants should have known better and complained earlier. This Court's position, however, has consistently been that persons seeking to represent themselves cannot be expected or required to "know better" or to complain earlier.

The responsibility is with the district judge to give the proper advice and to make the appropriate inquiry and to ascertain whether there is an intelligent waiver before a person

* Messrs. Plattner, Harrison and Martinez all said that they "wanted" to represent themselves, yet this Court reversed their cases.

is permitted to proceed pro se. When a court fails to make any such inquiry in advance, it has no record upon which to speculate that the pro se litigant knew or should have known better.

The district court's failure to make even the most minimal inquiry herein before permitting appellants Julio and Luis Rosado to proceed pro se requires a vacatur of the contempt finding against them.

POINT II

THE RECORD ESTABLISHES THAT MR. KUNSTLER WAS NOT YET ADEQUATELY FAMILIAR WITH THE CASE TO REPRESENT ANDRES ROSADO ON AUGUST 22, 1977.

August 22, 1977, was by no means the first time appellant Andres Rosado had appeared before a grand jury in connection with the FALN bombing investigation. He had testified (without ever having sought any grant of immunity) in both February, 1976, and April, 1976, before the April, 1975, additional Grand Jury in the Southern District of New York, on the subject of the same bombing investigation. Mr. Berman had been appellant Andres Rosado's attorney in the spring of 1976, and, through a process of lawyerly consultation with the United States Attorney's office, confrontation and imprisonment had been avoided.

Between August 16 and August 22, 1977, however, things simply went too fast, and Andres Rosado was suddenly a prisoner in MCC (where he still remains), before there was any meaningful

opportunity for Mr. Kunstler to either negotiate with his adversary or to prepare an adequate defense to the charge of contempt.

We will concede right away that the Court was reasonable enough to give Mr. Kunstler a six-day adjournment (August 16 to August 22) in order to prepare respectable motion papers ("I want to put together a substantial set of papers" R.7). And, despite the fact that he spent a considerable portion of the adjournment period out of town, on the Kent State case, Mr. Kunstler was able, on August 22, to file three separate motions directed at the subpoena: A motion to quash because of abuse of the grand jury; a motion for disclosure of electronic surveillance; and a motion for disclosure of interview reports and of the minutes of appellant Andres Rosado's previous grand jury testimony (A-6 through A-23).

But, again, these motions were directed at the subpoena. When the Court denied all the motions on August 22, Mr. Kunstler had several good reasons to expect that there would be an interval of at least a few days in which to prepare a defense against a contempt charge: He mistakenly believed that appellant Andres Rosado would be granted immunity,* and that the

* That had been the procedure followed with all the previous recalcitrant witnesses in the FALN bombing investigation (Torres, Cueto, Nemikin and Archuleta).

August 22 proceedings were "going to be an immunity grant" (C.18). He later mistakenly believed that the government was proceeding under Rule 42(b), rather than 28 U.S.C. §1826 (C.25).

A grand jury witness is entitled not only to time to prepare motions attacking his subpoena, but also, if those motions are denied, he is entitled to a reasonable amount of time in which to prepare a defense to any contempt charge. In re Sadin, 509 F.2d 1252 (2d Cir. 1975). Appellant Andres Rosado made his refusal before the grand jury on the afternoon of August 22, and there was simply no reason to hold the contempt hearing immediately, that very same afternoon.

Appellant Andres Rosado was directly prejudiced by this holding of the contempt hearing immediately after his refusal in the grand jury. Not only was Mr. Kunstler new to the case, but the case of Andres Rosado was one with a lengthy history, and Mr. Kunstler was certainly not aware of the details of that history. He had sought, by a motion which was denied, a copy of the minutes of Andres Rosado's prior testimony (on two occasions) before the grand jury. Even if the Court was unwilling to give those minutes to Mr. Kunstler, the Court itself should have taken the time to obtain and examine those minutes in camera, for they might well have established that Andres Rosado had "just cause," under §1826, to refuse to comply with the instant subpoena. Unfortunately, Mr. Kunstler was too new to the case to have a

sufficient familiarity with the prior proceedings to be able to point out to the Court what to look for in those minutes and why to expect that those minutes should evidence such "just cause."

Similarly, even after Andres Rosado refused to comply with the instant subpoena, a brief adjournment of the contempt hearing might well have given Mr. Kunstler enough time to familiarize himself with the case so that he would have been able to negotiate a compromise with the prosecutor's office which would have eliminated the necessity of ever holding the contempt hearing.*

The aim of §1826 is not to put people in jail. Its purpose is to see that recalcitrant witnesses are pressured into compliance. A short adjournment, long enough only for Mr. Kunstler to better acquaint himself with the case, or long enough for Mr. Berman to have returned (six more days would have been enough), might have given appellant Andres Rosado the time to prepare an adequate defense to the contempt charge, or, on the other hand, might have given appellant Andres Rosado the impetus to have his lawyer seek some compromise which would have rendered incarceration unnecessary.

Instead, the Court elected to move things too fast, and now Andres Rosado is in jail and the government still does not

* For example, Mr. Kunstler, if given enough time, might have been able to secure the fingerprints, palmprints and photographs from some already-existing records, which were alluded to in the negotiations around Andres Rosado's earlier subpoena. Also, a compromise might have been worked out where these materials would be given to the prosecutor, rather than to the grand jury.

what it had sought from him.

This Court is urged to vacate the contempt charge against Andres Rosado so that he may have the opportunity to begin afresh, with the assistance of Mr. Berman (who knows the case well), to seek some less drastic resolution of the manner in which to respond to the subpoena.

POINT III

APPELLANTS PRESENTED A SUFFICIENT SHOWING OF POSSIBLE ILLEGAL WIRETAPPING TO TRIGGER THE REQUIREMENT THAT THE GOVERNMENT RESPOND UNDER 18 U.S.C. §3504.

Although appellants' original electronic surveillance motion, dated August 21, 1977, lacked any supporting affidavits, it is equally clear that appellants' amended motion, including all the facts, affidavits and exhibits offered, filed and referred to during the argument on September 16, 1977, provided a colorable factual basis for their claim, and was sufficient to trigger the requirement that the government respond under 18 U.S.C. §3504. Gelbard v. United States, 408 U.S. 41 (1972); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

Appellants presented the following:

1.) An affidavit from their 'regular' attorney, Mr. Berman, that he called New York City from Guatemala City on August 11, 1977, to ascertain whether there were any urgent matters at his office, and was told that there was no activity concerning the Rosados' case (A-29). Curiously, the very next day the three appellants were subpoenaed and were stuck without their attorney.

2.) An affidavit from Julio Rosado's wife that on August 3, 1977, several hours after the Mobil Building bombing, she came home to discover that two F.B.I. agents (one was named Welford) were standing immediately outside her apartment door, and that the door had already been unlocked (A-44).

3.) Another affidavit from Mrs. Rosado, establishing that she had noticed, when using her home phone, frequent loud clicks at the beginnings of conversations, whirring sounds in the background, sudden drops in volume, very frequent "wrong numbers" and "crossed wires," and conversations which were inexplicably cut off (A-39).

4.) Phone bills for the Rosados' home phone, establishing numerous calls to number (312) 235-2801, in Chicago, in July and August of 1977 (A-40).

5.) Photographs of the phone lines leading to (312) 235-2801, copies of which were on file in Federal court in Chicago, indicating additional wires spliced into those phone lines (M.8-9).

6.) A copy of the March 6, 1977, affidavit of a telephone expert, on file in the Chicago case, accompanied by illustrations and sketches, and expressing the opinion that the above photographs depict an unauthorized splice (M.8).

7.) Additional documents from the Chicago case (M.8) and an affidavit of Mrs. Rosado (A-38, 39), establishing that the (312) 235-2801 phone number is that of Jose Lopez, one of the

witnesses subpoenaed in the Chicago FALN grand jury investigation.*

8.) A letter from F.B.I. Director Clarence M. Kelley, dated July 26, 1977, admitting, under the Freedom of Information Act, that the F.B.I. was in possession of "documents relating to Mr. Berman" (A-42).

9.) The reported theft from Mr. Berman's office during the night of August 15, 1977, of a well-concealed, but inexpensive safe, which contained the personal papers of Pedro Archuleta, one of the earlier recalcitrant witnesses before the Southern District bombing investigation grand jury (M.53-55).

10.) The fact that the government was asking appellants for voice exemplars, to compare with recorded telephone conversations.

11.) The fact that in the case of another militant advocate of Puerto Rican independence represented by Mr. Berman (United States v. Benjamin Cruz, 72 Cr. 60. S.D.N.Y.), the government nollied the indictment rather than give a proper answer to the defendant's electronic surveillance motion (M.58).

Yet Judge Owen ruled that:

...the showing made by the Rosados is insufficient to require the government even to file an affidavit...denying or affirming that the basis for the grand jury subpoena for the Rosados was the fruit of a wiretap.
(A-57)

Judge Owen relied on In re Archuleta, _____ F.2d _____ (2d Cir. August 19, 1977), slip op. 5321. But even in Archuleta,

* The district judge in Chicago denied the electronic surveillance motion there, and Judge Owen refused to make his own determination (A-55).

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..
supra, there had been a denial by the government, and the issue was rather whether that denial was based on a sufficient search.

Indeed, under the plain meaning of §3504, under Gelbard, supra, and Alter, supra, and under all the §3504 cases decided in this Circuit,* appellants have presented a sufficient showing to trigger the requirement that the government respond by conducting a check of the agencies involved in the FALN bombing investigation, and then either affirm or deny that the basis for the subpoena herein was the fruit of a wiretap.

CONCLUSION

THE ORDER OF CONTEMPT SHOULD BE VACATED.

Respectfully submitted,


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November 4, 1977

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..
* See, e.g., United States v. Grusse, 515 F.2d 157, 159 (2d Cir. 1975); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); In re Millow, 529 F.2d 770 (2d Cir. 1976).

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LARRY LONG, being duly sworn, deposes
and says: deponent is not a party to the action, is over
18 years of age and resides at 212 E. 11 St., NY NY.

On November 4, 1977, served the within

upon Appellants' Brief
Robert B. Fiske, Jr. attorney(s)

for Government in this action, at

1 St. Andrew's Plaza
NY NY 10007
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in - post office- official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Larry Long
LARRY LONG

Sworn to before me on
November 4, 1977.

Jesse Berman

JESSE BERMAN
Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 1978